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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

HENRY J. KIRKSEY, *et al.*,
Appellants,

v.

STATE OF MISSISSIPPI

and

UNITED STATES OF AMERICA,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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JURISDICTIONAL STATEMENT

WILLIAM L. ROBINSON
FRANK R. PARKER *
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
733 15th Street, N.W.
Suite 520
Washington, D.C. 20005
(202) 628-6700

ROBERT BRUCE MCDUFF
University of Mississippi
Law Center
University, Ms. 38655
Attorneys for Appellants

* Counsel of Record

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QUESTIONS PRESENTED

1. After a Section 5, Voting Rights Act, declaratory judgment action has been filed in District Court seeking judicial preclearance of a state legislative reapportionment plan, does the Attorney General, who is a litigant in that action, have the authority unilaterally to grant Section 5 preclearance of that reapportionment plan over the objections of adversely affected black applicants for intervention, thus rendering the lawsuit moot and denying those black voters an opportunity to present evidence in District Court that the plan is racially discriminatory in purpose and effect?

2. May black voters who allege and show that they are adversely affected by a new state legislative reapportionment plan be denied intervention under Rule 24(a) and (b) in a Section 5 declaratory judgment action seeking judicial preclearance of the new plan, when disposition of the action would as a practical matter impair their ability to protect their interest in a nondiscriminatory state legislative reapportionment plan and their interests are not adequately represented by the existing parties?

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JURISDICTIONAL STATEMENT

Appellants, twenty-five black voters of the State of Mississippi,[1] appeal from the final judgment of the United

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[1] Appellants are state Senator Henry J. Kirksey, a black member of the Mississippi Senate and registered voter in Hinds County, Mississippi, Owen H. Brooks, a black resident and registered voter of Washington County, Mississippi, Carroll Rhodes, a black resident and registered voter of Copiah County, Mississippi, Representative Tyrone Ellis, a black member of the Mississippi House of Representatives and registered voter of Oktibbeha County, Mississippi, Evan Doss, Jr., tax assessor and a black registered voter of Claiborne County, Mississippi, Henry Boyd, Jr., a black resident and registered voter of Marshall County, Mississippi, June Johnson, a black resident and registered voter of Leflore County, Mississippi, Abraham Gates, a black resident and registered voter of Humphreys County, Mississippi, Eugene Fouche, a black resident and

States District Court for the District of Columbia (three-judge court) dismissing a declaratory judgment action filed by the State of Mississippi seeking preclearance of its 1982 legislative redistricting plan under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. The District Court based its decision to dismiss on the fact that the United States Attorney General administratively precleared the 1982 Mississippi legislative redistricting plan, even though that preclearance action occurred after the declaratory judgment action was filed in District Court. In light of its view that the case should be dismissed, the District Court also denied the timely motion of appellants to intervene. Appellants contend that once a Section 5 declaratory judgment action is filed in the United States District Court for the District of Columbia, the

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registered voter of Yazoo County, Mississippi, Mayor Robert Gray, Mayor of Shelby, Mississippi and a black registered voter of Bolivar County, Mississippi, Mayor Johnny B. Thomas, Mayor of Glendora, Mississippi and a black registered voter of Tallahatchie County, Mississippi, Supervisor Bennie Thompson, a black member of the Board of Supervisors and registered voter of Hinds County, Mississippi, Harry Bowie, a black resident and registered voter of Pike County, Mississippi, John W. Jackson, a black resident and registered voter of Clay County, Mississippi, Councilman Joe Edwards, a city councilman of Columbus, Mississippi and black registered voter of Lowndes County, Mississippi, Edward Blackmon, a black resident and registered voter of Madison County, Mississippi, Mrs. Jesse D. Banks, a black resident and registered voter of Holmes County, Mississippi, Robert Jackson, a black resident and registered voter of Quitman County, Mississippi, Charles McLaurin, a black resident and registered voter of Sunflower County, Mississippi, state Representative David Green, a black member of the Mississippi House of Representatives and registered voter of Amite County, Mississippi, state Representative Barney Schoby, a black member of the Mississippi House of Representatives and registered voter of Adams County, Mississippi, Denise Walls, a black resident and registered voter of Coahoma County, Mississippi, Robert M. Walker, a black resident and registered voter of Warren County, Mississippi, Mrs. Emma Harris, a black resident and registered voter of Sharkey County, Mississippi, and Mrs. Reecy L. Dixon, a black resident and registered voter of Noxibee County, Mississippi.

Attorney General has no preclearance authority over that submitted plan, and the District Court becomes the sole arbiter of the Section 5 issues before the Court. Therefore, the District Court's dismissal erroneously resulted from an invalid action of the Attorney General and should be reversed. The District Court's denial of appellants' motion to intervene also should be reversed.

OPINION BELOW

The opinion and order of the three-judge District Court for the District of Columbia is unreported and is set out in Appendix A.

JURISDICTION

The judgment of the three-judge District Court was entered on January 12, 1983. Appellants filed a timely notice of appeal within 60 days of the entry of the final judgment, 28 U.S.C. § 2101(b), on March 10, 1983, and the notice of appeal is set out in Appendix B. Upon the filing of an application for an extension of time within which to docket this appeal, the Chief Justice on April 12 extended the time for docketing this appeal to May 12, 1983. The jurisdiction of this Court is invoked pursuant to 42 U.S.C. § 1973c. This Court has jurisdiction of this appeal. *NAACP* v. *New York*, 413 U.S. 345, 353-56 (1973); *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967).

STATUTORY PROVISION AND FEDERAL RULE INVOLVED

42 U.S.C. § 1973c; Rule 24, Fed. R. Civ. P. (included verbatim in Appendix C).

STATEMENT OF THE CASE

The State of Mississippi filed this action on September 20, 1982 seeking a declaratory judgment, pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C.

§ 1973c, that its 1982 state legislative reapportionment plan (S.B. 2430, 1982 Miss. Laws ch. 305, and H.B. 315, 1982 Miss. Laws ch. 306 (hereinafter S.B. 2430 and H.B. 315)) does not have a racially discriminatory purpose or effect. The plan substantially changes the boundaries of Mississippi's 122 House districts and 52 Senate districts. The United States Department of Justice, representing the defendant United States, filed its answer on November 1, 1982, and on November 18, 1982, appellants filed a motion for leave to intervene and proposed answer to oppose District Court approval of Mississippi's reapportionment plan.

Prior to filing this action, Mississippi submitted S.B. 2430 and H.B. 315 to the Attorney General for administrative preclearance under Section 5. By letter dated August 25, 1982, the Attorney General responded with a request that the state supply additional information. Mississippi then filed this lawsuit.

Appellants alleged in support of their intervention pursuant to Rule 24(a), Fed. R. Civ. P., that they were adversely affected by Mississippi's 1982 legislative reapportionment plan. They alleged that the plan has both the purpose and effect of denying and abridging their right to vote on account of race, that they were so situated that the disposition of this action would as a practical matter impair or impede their right to vote free of racial discrimination protected by Section 5 of the Voting Rights Act, that appellants' interests as black citizens and black voters and as representatives of the class of black citizens and black voters were not adequately protected by the existing parties, and that their participation was necessary to ensure a proper adversarial proceeding in this action. Motion to Intervene, pp. 1-3. Alternatively, appellants alleged pursuant to Rule 24(b), Fed. R. Civ. P., that they had defenses to plaintiff's claims presenting both questions of law and fact which are common to this action. *Id.*, p. 3.

On November 22, 1982, the Department of Justice notified Mississippi that the Attorney General would not interpose a Section 5 objection to the 1982 legislative reapportionment plan. Mississippi and the Justice Department then filed, on December 2, 1982, a joint motion to dismiss this action, claiming the action was moot in light of the Attorney General's purported administrative preclearance of the plan. Mississippi and the Justice Department also filed memoranda opposing appellants' motion to intervene.

In support of their motion to intervene and in opposition to the joint motion to dismiss filed by the plaintiff and the Department of Justice, appellants submitted an affidavit analyzing the discriminatory and retrogressive effect of the plan which showed that the new plan reduces the number of districts which are 65 percent and over black in voting age population from 14 to 9, and reduces the number of districts which are 60 percent black and over in voting age population from 19 to 16.[2] Appellants

[2] Applicants-Intervenors' Memorandum of Points and Authorities in Opposition to the Motion to Dismiss and Reply to the Justice Department's Opposition to the Motion to Intervene, Affidavit of Robert B. McDuff, p. 2. The District Court for the District of Columbia previously has found, and Mississippi has recently stipulated, that because of a past history of racial discrimination, lower black voter registration and turnout, and racial bloc voting, election districts in Mississippi generally must be at least 65 percent black in population or 60 percent black in voting age population to provide black voters with an opportunity to elect candidates of their choice. *Mississippi* v. *United States*, 490 F. Supp. 569, 575 (D.D.C. 1979), *aff'd mem.*, 444 U.S. 1050 (1980); *Mississippi* v. *Smith*, 541 F. Supp. 1329 (D.D.C. 1982), First set of Stipulations, filed April 30, 1982, Stipulation No. 16. Accord: *Donnell* v. *United States*, Civil No. 78-0392 (D.D.C. July 31, 1979) (Finding No. 37), *aff'd mem.*, 444 U.S. 1059 (1980) (Warren County, Mississippi). An analysis of the 1979 state legislative elections shows that in the Mississippi House of Representatives, no black candidate, except one, was elected from a state House district with a black voting age population under 60 percent, and no black candidate was elected from any district in the Delta area with a black voting age population under

also filed memoranda opposing the joint motion to dismiss contending that Section 5 of the Voting Rights Act vests the District Court with the primary role of protecting the rights of black voters to be free of discriminatory voting law changes once its jurisdiction is invoked by a state in a Section 5 declaratory judgment action, and that the action should not be dismissed without according appellants an opportunity to be heard.

The District Court on January 12, 1983 without a hearing granted the motion to dismiss and denied appellants' motion to intervene. In its brief two-page opinion the Court held:

> The Attorney General's action in preclearing the plan has removed the controversy between the parties and rendered moot the State's suit for a declaratory judgment. Section 5 provides for either administrative *or* judicial review, not both. Moreover, private parties may not obtain judicial review of the Attorney General's Section 5 decision, but may challenge a proposed electoral change in traditional constitutional litigation. *Morris* v. *Gressette*, 432 U.S. 491, 506-07 (1977).

Appendix A, *infra*, p. 2a.

THE QUESTIONS ARE SUBSTANTIAL

This appeal raises the important issue of the respective Section 5 preclearance powers of the United States District Court for the District of Columbia and the United States Attorney General once a Section 5 declaratory judgment action has been filed in the District Court. The Court below assumed without much discussion that the Attorney General as a litigant in a Section 5 declaratory judgment action may unilaterally cause the dismissal of the lawsuit and preclude further District Court review

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65.91 percent. McDuff Affidavit, pp. 1-2. This analysis also shows that for the Mississippi Senate, no black candidate was elected from a district with a black voting age population under 69 percent. *Id.*

simply by agreeing to a redistricting plan and calling that agreement "preclearance."

However, this Court held in *City of Port Arthur* v. *United States*, 103 S.Ct. 530 (1982), that the Attorney General's approval of a covered jurisdiction's redistricting plan, presented to the District Court in a joint submission, does not dictate the District Court's action and does not require that the District Court preclear the plan. The question here is whether the Attorney General can accomplish through the back door what cannot be done through the front—whether he can merely call his agreement to the plan "preclearance" rather than making a joint submission or presenting a proposed consent decree to the District Court, and thereby steer clear of the already-filed lawsuit, unilaterally causing the court action to be dismissed without independent District Court review.

This is an issue capable of recurrence, particularly as a number of local governments are now seeking preclearance of redistricting plans drawn in response to the 1980 Census. The scope of the District Court's authority must be established for those instances in which the Attorney General, after a Section 5 action has been filed before the District Court, agrees to the redistricting plan of a covered jurisdiction. *City of Port Arthur* states that the District Court has primary preclearance authority, and that ruling should control situations such as the present case where the Attorney General terms his agreement a "preclearance" and seeks to skirt the purview of the District Court.

This case is not precluded by *Morris* v. *Gressette*, 432 U.S. 491 (1977). In *Morris*, this Court held that the correctness of a Section 5 preclearance decision by the Attorney General is not subject to judicial review in a subsequently-filed lawsuit. Here, however, appellants do not raise the issue of whether the Attorney General was right or wrong on the merits of his preclearance decision. They

argue instead that the Attorney General *had no authority* to preclear the voting change once a Section 5 declaratory judgment lawsuit had been filed, and that preclearance lay solely within the province of the District Court.

This appeal also presents the important question, which also is subject to recurrence, whether black voters in a state covered by Section 5, who are the intended beneficiaries of the Section 5 preclearance procedure, have a right to intervene in a Section 5 judicial proceeding to prevent their right to a nondiscriminatory and nonretrogressive legislative reapportionment plan from being prejudiced or bargained away by agreement between the submitting jurisdiction and the Department of Justice.

I. THE DISTRICT COURT'S DECISION CONTRAVENES THIS COURT'S DECISION IN *CITY OF PORT ARTHUR* v. *UNITED STATES* AND OTHER DECISIONS OF THIS COURT AND SUBVERTS THE PURPOSE OF THE VOTINGS RIGHTS ACT TO ACCORD JUDICIAL AUTONOMY IN JUDICIAL PRECLEARANCE PROCEEDINGS.

This Court in *City of Port Arthur* v. *United States*, 103 S.Ct. 530 (1982), ruled that the Attorney General may not dictate the Section 5 propriety of a city's redistricting plan simply by agreeing to the plan and joining the city in submitting it to the District Court. The Attorney General may not get around the *Port Arthur* ruling and dictate the District Court's decision in the present case simply by calling his agreement to the plan "preclearance" rather than making a joint submission to the District Court.

In the *Port Arthur* case, after the District Court had held that the municipal expansions required the City to adopt a representation plan which reflected black potential political strength in the enlarged community, the Attorney General approved a new 4-2-3 representation plan. The City and the Attorney General jointly submitted this

plan to the District Court for approval. The intervenors, black voters of Port Arthur, objected to this new representation scheme. The District Court refused to be bound by the Attorney General's approval and rejected the plan because it failed fully to neutralize the adverse impact resulting from the city expansions. The court ruled that if the plan were modified to eliminate the majority vote requirement for the two at-large council seats, it would approve the plan. 103 S.Ct. at 533-34.

This Court affirmed on appeal. The Court expressly repudiated the City's argument that the Attorney Generals' assent to the new representation scheme required the District Court to approve it:

> The City argues that the District Court was required to approve a plan jointly submitted by the City and the Attorney General. The Voting Rights Act, however, assigns primary responsibility to the District Court to determine whether a change in voting procedures violates § 5. Preclearance by the Attorney General may obviate a court suit, but here the Attorney General was acting in the capacity of a litigant when it joined the City in submitting a plan for the court's consideration. In that posture, neither the Attorney General, the City, nor both of them together could dictate the court's conclusion as to the acceptability of the plan under § 5.

103 S.Ct. at 534 n.5.

This Court's ruling that the Voting Rights Act "assigns primary responsibility to the District Court to determine whether a change in voting procedures violates § 5" should control the present case, where the Attorney General called his agreement to Mississippi's reapportionment plan "preclearance" rather than presenting it to the District Court in the form of a joint motion for approval. Form would be exalted over substance if the Attorney General were able to achieve an entirely different result and to dictate the District Court's decision by taking the techni-

cal step of writing a letter of no-objection to the submitting jurisdiction and calling his agreement to the plan "preclearance." Although appellants directed the District Court's attention to the *Port Arthur* decision immediately after it was handed down, the District Court did not discuss the *Port Arthur* decision in dismissing this case nor attempt to distinguish it in any way.[3]

Similarly, in *City of Richmond* v. *United States*, 422 U.S. 358 (1975), during the pendency of Richmond's Section 5 preclearance action for approval of its annexation but prior to trial, the City of Richmond adopted and the Attorney General approved, with minor modifications, a new nine-ward voting plan to replace its at-large election system. 422 U.S. at 366. The City and the Attorney General submitted this new ward voting plan to the District Court in the form of consent judgment. *Id.* The intervenors opposed the new plan, and the District Court referred the case to trial before a special master. *Id.* After receiving the special master's findings, the District Court rejected approval of the ward plan as failing fully to neutralize the adverse effect of the annexations. *Id.* at 367.

On appeal, the City argued that the Attorney General's approval of the new ward plan should have been given "deference" by the District Court because the Attorney General under Section 5 of the Voting Rights Act "is given equal responsibility with the District Court for

[3] The inconsistency between what happened here and this Court's ruling in *Port Arthur* cannot be explained by this Court's observation that "[p]reclearance by the Attorney General may obviate a court suit . . ." 103 S.Ct. at 534 n.5. That statement obviously refers to the normal situation in which a covered jurisdiction submits an election law change to the Attorney General for administrative preclearance and does not file a Section 5 lawsuit until a final administrative ruling has been obtained. If the Attorney General preclears the change, a court suit is unnecessary. In any event, the Court said that administrative preclearance "*may* obviate a court suit," not that it *necessarily would* obviate a court suit.

an initial decision upon voting changes." Reply Brief for Appellant, p. 5; also Brief for the Appellant, pp. 62-63. This Court did not accept the Attorney General's approval as binding, but instead reviewed the case solely on its merits. The Court thereby implicitly rejected the City's argument that the District Court was in any way bound by the Attorney General's approval of the new ward plan or that this approval in any way constituted Section 5 preclearance of the new plan.

The District Court's ruling here that the Attorney General's approval of Mississippi's legislative reapportionment plan "removed the controversy between the parties and rendered moot the State's suit for a declaratory judgment" therefore is fundamentally inconsistent with this Court's rulings in *Port Arthur* and *City of Richmond*. In both cases, after declaratory judgment actions had commenced, the Attorney General approved new election law changes, but in both cases both the District Court and this Court rejected the cities' contentions that the Attorney General's approval rendered the controversy moot and dictated the acceptability of the changes under Section 5 standards.[4]

Allowing the Attorney General unilaterally to preempt the jurisdiction of the District Court subverts the purpose of the Voting Rights Act to accord "primary responsibility" and judicial autonomy to the District Court once its jurisdiction has been invoked by a cov-

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[4] In one prior case, *Senate of State of California* v. *United States*, Civil No. 81-2767 (D.D.C. filed Nov. 17, 1982), the Attorney General declined Section 5 review of a state legislative reapportionment plan submitted to him after a Section 5 declaratory judgment action had been filed. Letter from William Bradford Reynolds, Assistant Attorney General, to William N. Durley, Feb. 19, 1982. This action contradicts the Justice Department's position, taken here, that it has continuing jurisdiction to review the same reapportionment plan which is the subject of a Section 5 declaratory judgment action.

ered jurisdiction.[5] It would give free rein to covered states and localities to play the administrative jurisdiction of the Attorney General off against the judicial jurisdiction of the District Court in sporadic fashion to subvert the salutary purposes of the Section 5 preclearance process. A state or locality could submit a voting law change first to the Attorney General, then to the District Court, then back to the Attorney General, playing one off against the other until it obtained a resolution from one source or the other to its liking, without regard for the orderly processes of law. The voting rights of minority citizens, which the Act was passed to protect, would get lost in the shuffle, as they have here.[6]

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[5] A Section 5 declaratory judgment action is not a judicial review of an agency determination, but rather is an independent judicial proceeding requiring *de novo* review of the covered election law change. *Morris* v. *Grissette, supra,* 432 U.S. at 505 n.21. As such, it cannot be rendered moot by action of the administrative agency, here, the Department of Justice. Cf. *Consolidated Express, Inc.* v. *New York Shipping Association, Inc.,* 602 F.2d 494, 525 (3d Cir. 1979); *Nader* v. *Volpe,* 475 F.2d 916 (D.C. Cir. 1973); *United States* v. *Open Bulk Carrier, Ltd.,* 465 F. Supp. 159 (S.D. Ga. 1979).

[6] If the District Court's order is sustained, the Attorney General also theoretically would have the authority to circumvent a decision of this Court. Under the Justice Department's Section 5 regulations, the Attorney General has the power to withdraw a Section 5 objection at any time. *Procedures for the Administration of Section 5 of the Voting Rights Act of 1965,* 28 C.F.R. §§ 51.44-51.47 (Jan. 5, 1981). Thus, without resort to the judicial process, the Attorney General would possess the authority to withdraw a Section 5 objection even after the District Court in a Section 5 declaratory judgment action had refused to approve a submitted plan and this Court had affirmed. Cf. *Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary,* 97th Cong., 2d Sess., Vol. 1, 680-82, 699-703 (1982) (testimony of state Sen. Henry J. Kirksey and exhibits) (1976 objection to municipal annexation in Jackson, Mississippi, withdrawn five years later after intervention by members of Mississippi's congressional delegation).

This has already happened in *City of Port Arthur* v. *United States, supra.* After this Court's decision affirming the District

The principle that the Voting Rights Act assigns "primary responsibility" for Section 5 preclearance to the District Court is implicit in the legislative history of the Act. The original version of Section 5 initially considered by Congress in 1965 provided for preclearance only through the District Court. *Morris* v. *Gressette, supra*, 432 U.S. at 503. In response to concerns expressed by some Senators that the covered states would be under a heavy burden to file a lawsuit in the District of Columbia every time a voting change was contemplated, Attorney General Katzenbach stated that many of the voting changes would be noncontroversial and suggested a procedure by which the United States Attorney General could approve those changes without the necessity of a court suit. *Hearings on S. 1564 Before the Senate Committee on the Judiciary*, 89th Cong., 1st Sess., pt. 1, at 237 (1965) (Attorney General Katzenbach, responding to questions from Senator Ervin of North Carolina). That suggestion was later implemented, and Section 5 as enacted contained the alternative of preclearance through the Attorney General.

The administrative preclearance procedure by way of the Attorney General was thus intended by Congress as "an expeditious alternative to declaratory judgment actions," *Morris* v. *Gressette, supra*, 432 U.S. at 504, and was not intended to circumvent the jurisdiction of the

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Court's decision, the Attorney General on March 21, 1983, without first seeking leave of the District Court, withdrew his objection to the municipal consolidations and annexation at issue in that case, thus preclearing, for Section 5 purposes, the disputed voting law changes. Although the Attorney General's action in that case met the conditions established by the District Court for Section 5 preclearance, this assertion of power to preclear changes which are the subject of judicial proceedings would allow the Attorney General to overturn decisions of this Court with which he disagreed simply by sending the submitting jurisdiction a Section 5 letter of no-objection.

District Court once a declaratory judgment action has been filed.[7]

This interpretation is not disadvantageous to covered jurisdictions in any way because the District Court's authority over preclearance can only be invoked by a covered jurisdiction through the filing of a Section 5 declaratory judgment action. If the covered jurisdiction prefers first to seek administrative preclearance from the Attorney General without a declaratory judgment proceeding, it is free to do so. But once the covered jurisdiction affirmatively chooses to place the issue of whether its voting law change is racially discriminatory before the District Court, that court should become the sole ar-

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[7] This interpretation is supported by the text of Section 5 itself. Section 5 provides that whenever any covered state or political subdivision enacts or seeks to administer a covered voting law change,

> such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such [voting law change] does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color [or language minority status], and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such [voting law change]:

42 U.S.C. § 1973c. Section 5 then provides:

> *Provided*, that such [voting law change] may be enforced *without such proceeding* if the [voting law change] has been submitted . . . to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission . . .

Id. (emphasis added). The text of the statute itself demonstrates two major points. First, it demonstrates the primacy of the declaratory judgment action in the District Court. Second, it allows preclearance by the Attorney General only "without such proceeding," that is, in the absence of a declaratory judgment proceeding. The text of the statute itself thus supports the interpretation that Congress intended that once a Section 5 declaratory judgment proceeding was commenced by a covered jurisdiction, the Attorney General no longer has the authority to preclear a covered voting law change.

biter of whether or not the change violates Section 5. This interpretation also furthers the legislative purpose of the Voting Rights Act of protecting minority citizens' right to vote and to participate in the political processes without discrimination. In the declaratory judgment proceeding, minority voters generally have the opportunity to intervene and participate as an equal litigant, thus giving them an equal voice to prevent the dissipation of their voting rights at the hands of the other litigants in the judicial proceeding.

For these reasons, the District Court erred in ruling that the Attorney General's action in approving Mississippi's legislative reapportionment plan rendered Mississippi's lawsuit for a Section 5 declaratory judgment moot.

II. THE DISTRICT COURT ERRED IN DENYING INTERVENTION TO APPELLANTS IN THIS ACTION.

This Court should review the District Court's decision to deny intervention to appellants because it presents a substantial question subject to recurrence and because this case presents a conflict of authority in the District Court for the District of Columbia on whether minority voters have a right to intervene in Section 5 preclearance actions. In the Georgia congressional redistricting case, *Busbee* v. *Smith*, 549 F. Supp. 414 (D.D.C. 1982) (three-judge court), *aff'd mem.*, 51 U.S.L.W. 3553 (U.S. January 25, 1983), the District Court allowed minority voters to intervene as of right pursuant to Rule 24(a). *Busbee v. Smith*, Order of March 22, 1982.[8]

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[8] The District Court for the District of Columbia normally grants intervention to minority voters in Section 5 declaratory judgment actions. See *City of Port Arthur* v. *United States*, 517 F. Supp. 987 (D.D.C. 1981), *aff'd*, 103 S.Ct. 540 (1982) (intervention allowed to black voters who provided sole opposition to the redistricting plan jointly submitted to the District Court by the Attorney General and the City); *City of Richmond* v. *United*

Rule 24 should be liberally construed to do substantial justice. *Washington State Building and Construction Trades Council, AFL-CIO* v. *Spellman*, 684 F.2d 627, 630 (9th Cir. 1982); 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1904 (1972). Rule 24(a)(2) confers a right to intervene upon a timely application when the applicant for intervention (1) claims an interest relating to the property or transaction which is the subject of the action, (2) is so situated that the disposition of the action may "as a practical matter" impair or impede his ability to protect that interest, and (3) shows that movant's interest is not adequately represented by the existing parties. Appellants satisfied all these conditions for intervention of right.

First, they showed that they had a "significantly protectable interest" (*Donaldson* v. *United States*, 400 U.S. 517, 531 (1971)) in a state legislative reapportionment plan which meets Section 5 standards. Section 5 was en-

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States, 375 F. Supp. 1344, 1349 n.23 (D.D.C. 1974), *vac'd and remanded on other grounds*, 422 U.S. 358 (1975) (intervention allowed to individual and black organization as representatives of black community; intervenors provided sole opposition to the proposed electoral change once the Justice Department agreed to the City's districting plan); *Mississippi* v. *Smith*, 541 F. Supp. 1329 (D.D.C. 1982), *appeal dism'd*, 51 U.S.L.W. 3789 (U.S. May 2, 1983) (Mississippi congressional redistricting plan, intervention allowed to black Mississippi voters); *Mississippi* v. *United States*, 490 F. Supp. 569 (D.D.C. 1979), *aff'd mem.*, 444 U.S. 1050 (1980) (Mississippi legislative reapportionment plan, intervention allowed to black Mississippi voters); *Donnell* v. *United States*, Civil No. 78-0392 (D.D.C. July 31, 1979), *aff'd mem.*, 444 U.S. 1059 (1980) (Mississippi county redistricting plan, black voters); *Beer* v. *United States*, 374 F. Supp. 357, 359 n.10 (D.D.C. 1974) and 374 F. Supp. 363, 367 n.5 (D.D.C. 1974), *vac'd on other grounds*, 425 U.S. 130 (1976) (intervention allowed to five black citizens registered to vote in New Orleans elections); *City of Petersburg, Virginia* v. *United States*, 354 F. Supp. 1021, 1024 (D.D.C. 1972) *aff'd mem.*, 412 U.S. 934 (1973) (court entered orders allowing black citizens leave to intervene).

acted to protect minority voters from election law changes which are racially motivated, and, as this Court said in *Beer* v. *United States*, 425 U.S. 130, 141 (1976), from redistricting plans which "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Allen* v. *State Board of Elections*, 393 U.S. 544, 554-57 (1969) (minority voters, as the intended beneficiaries of the Act, have a private right of action to enforce Section 5 preclearance requirements). Appellants therefore had a right to intervene in this lawsuit to protect their voting rights, and the voting rights of black Mississippians generally, from being eroded and diminished by the new state legislative reapportionment plan.

Second, it is clear that appellants are so situated that the final disposition of this action "may as a practical matter impair or impede [their] ability to protect that interest" (Rule 24(a)(2)) in a nondiscriminatory state legislative reapportionment plan which satisfies the requirements of Section 5. The rights appellants are asserting in this action are their Section 5 rights to a legislative reapportionment plan which is not racially discriminatory in purpose or retrogressive in effect. The District Court's denial of intervention and dismissal of this action has a direct impact on appellants' ability to protect their Section 5 rights: It deprives appellants of both the advantageous allocation of burden of proof and procedures of Section 5,[9] and the opportunity to challenge

[9] Section 5 was enacted to "shift the advantage of time and inertia" from covered jurisdictions to minority voters. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 328 (1966). Accordingly, a covered election law change cannot be implemented unless and until Section 5 preclearance has been obtained, the submitting jurisdiction has the burden of proving that an election law change is not discriminatory in purpose or effect, and venue in Section 5 cases is limited to the District Court for the District of Columbia, with a direct appeal to this Court. *Id.* In constitutional litigation, on the other hand, a change may be implemented until minority

the contested plan as violative of the Section 5 "effect" standard as applied by this Court in *Beer* v. *United States, supra.*[10]

The District Court erred when it apparently held that appellants would not be prejudiced by the dismissal because they "may challenge a proposed electorial change in traditional constitutional litigation" (App. A, p. 2a). This justification for denying intervention is erroneous because it misconstrues the interest asserted in this case. See 3B J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 24.07[3], p. 24-63 (2d ed. 1982) ("The question as to the practical effect on the interest of the applicant cannot properly be answered until the interest of the applicant is first analyzed and determined.") (footnote omitted). By the dismissal of this action, appellants lose all of their Section 5 claims.

The District Court's decision also is likely to have a substantial adverse impact on any future litigation chal-

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voter plaintiffs obtain a final judgment against it, minority voters have the burden of proving discriminatory purpose, and, in this case, venue would be the Mississippi District Court.

[10] The *Beer* retrogression standard was formulated in the context of Section 5 litigation, and it is not determinative either in constitutional litigation or in litigation under the 1982 amendment to Secton 2 of the Voting Rights Act (96 Stat. 131). In constitutional litigation, discriminatory effect is only one factor which the courts may consider: "disproportionate impact alone cannot be decisive, and courts must look to other evidence to support a finding of discriminatory purpose." *City of Mobile* v. *Bolden*, 446 U.S. 55, 70 (1980) (plurality opinion). Similarly, in litigation under the 1982 amendment to Section 2, discriminatory effect is only one factor to be considered. S. Rep. No. 97-417, 97th Cong., 2d Sess. 27-30 (1982); also, 128 Cong. Rec. S7095 (remarks of Sen. Kennedy) (daily ed. June 18, 1982); *id.* at H3841 (remarks of Rep. Sensenbrenner) (daily ed. June 23, 1982) ("the retrogression requirement of Beer against United States does not apply to Section 2 cases—although of course such a retrogression would be relevant evidence in a Section 2 case.").

lenging this plan. Under the 1966 revision of Rule 24 (a)(2), applicants for intervention are not required to show that the District Court's decision would have a *res judicata* effect. Advisory Committee Note on 1966 Amendment, 28 U.S.C.A., Rule 24, p. 17; 3B J. MOORE, *supra*, p. 24-63. It is sufficient that the disposition of the action may have a practical adverse or prejudicial impact on any future assertion of movant's claims. *Atlantis Development Corp.* v. *United States*, 379 F.2d 818, 826-29 (5th Cir. 1967); 3B J. MOORE, *supra*, pp. 24-64 to 24-65. As a practical matter, Section 5 preclearance is extremely prejudicial to any future lawsuit challenging a Section 5-approved redistricting plan. Appellants would not only have a heavier burden of proof, but they also would have an extremely difficult time overcoming the presumption accorded to Section 5 preclearance. See, e.g., *Perkins* v. *Matthews*, 400 U.S. 379, 390-91 (1971) (Attorney General's interpretations of Section 5 entitled to "great deference"). To our knowledge, no such actions have been successful.

Third, the fact that the Justice Department approved Mississippi's plan over the objections of appellants makes it crystal clear that the interests and positions of the Justice Department and appellants are diametrically opposed to one another, and that there is no party to this litigation who adequately represents the interests and concerns of the appellants. A number of cases brought before this Court have demonstrated that the Justice Department and minority intervenors frequently have adverse interests and have taken divergent positions on whether a particular change meets Section 5 standards, e.g., *City of Lockhart* v. *United States*, 51 U.S.L.W. 4189 (U.S. February 23, 1983); *City of Port Arthur* v. *United States*, *supra*; *City of Richmond* v. *United States*, *supra*, and this Court has sustained the position of intervenors, e.g., *City of Port Arthur* v. *United States*.

In the District Court pleadings, appellants alleged that this plan was enacted for a racially discriminatory purpose and presented incontrovertible statistical evidence that "the ability of minority groups to participate in the political process and to elect their choices to office is . . . *diminished*" (*Beer*, *supra*, 425 U.S. at 141) (*supra*, p. 5, n. 2). The practical effect of the District Court's summary dismissal of this action, without a hearing, is to deny black voters of Mississippi an opportunity to be heard in District Court on their proof that the plan fails to meet Section 5 standards. Appellants' claim to intervention is strengthened by the fact that they are seeking to secure the public rights of the black voters of Mississippi and to vindicate a policy that Congress considers of the highest priority.

> [W]here the enforcement of a public law also demands distinct safeguarding of private interests by giving them a formal status in the decree, the power to enforce rights thus sanctioned is not left to the public authorities nor put in the keeping of the district court's discretion.

Missouri-Kansas Pipe Line Co. v. *United States*, 321 U.S. 502, 506 (1941).

Alternatively, if this Court determines that intervention of right under Rule 24(a) was properly denied, then this Court should hold that the District Court abused its discretion in denying permissive intervention under Rule 24(b) because appellants had claims and proof bearing directly on the issue of whether the plan meets Section 5 standards. 3B J. MOORE, *supra*, ¶ 24.10.

For these reasons, the District Court's order denying appellants' motion to intervene should be reversed.

CONCLUSION

For the above-stated reasons, and on the basis of the authorities cited, this Court should note probable jurisdiction, reverse the judgment of the District Court dismissing this action as moot and denying intervention by appellants, and remand this case back to the District Court with instructions to conduct an independent review to determine whether S.B. 2430 and H.B. 315 meet Section 5 standards.

Respectfully submitted,

WILLIAM L. ROBINSON
FRANK R. PARKER *
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
733 15th Street, N.W.
Suite 520
Washington, D.C. 20005
(202) 628-6700

ROBERT BRUCE MCDUFF
University of Mississippi
Law Center
University, Ms. 38655

Attorneys for Appellants

* Counsel of Record

May 12, 1983

APPENDIX A

District Court Decision and Final Judgment

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-2673

STATE OF MISSISSIPPI,

v. *Plaintiff,*

UNITED STATES OF AMERICA,

Defendant.

[Filed Jan. 12, 1983]

MEMORANDUM AND ORDER

This matter is before the court on the motion to intervene of a group of black registered voters from Mississippi (the "Applicants") and on plaintiff's and defendant's joint motion to dismiss. The State of Mississippi brought this action seeking a declaratory judgment that its 1982 reapportionment of state legislative districts was valid under the Voting Rights Act of 1965, 42 U.S.C. § 1973c. The State brought suit when the Department of Justice ("DOJ") failed to grant the State's earlier application for Section 5 preclearance of the plan, but instead requested more information. In the early stages of this litigation the State furnished the requested information to DOJ, the administrative review continued, and the Attorney General precleared the plan on November 22, 1982. On December 2, 1982, the State and DOJ filed a joint motion to dismiss the case as moot, citing the Attorney General's preclearance.

Meanwhile, on November 18, 1982, the Applicants filed a motion to intervene in this action to challenge the legality of the reapportionment plan. Applicants have opposed the joint motion to dismiss.

Section 5 of the Voting Rights Act provides that a proposed reapportionment in a covered jurisdiction may be precleared either by a declaratory judgment by this court that the proposed change is free from any racially discriminatory purpose or effect, or through submission of the plan to the Attorney General and the Attorney General's failure to interpose any objection thereto within 60 days. 42 U.S.C. § 1973c; *Georgia* v. *United States*, 411 U.S. 526, 529 (1973).

The Attorney General's action in preclearing the plan has removed the controversy between the parties and rendered moot the State's suit for a declaratory judgment. Section 5 provides for either administrative *or* judicial review, not both. Moreover private parties may not obtain judicial review of the Attorney General's Section 5 decision, but may challenge a proposed electoral change in traditional constitutional litigation. *Morris* v. *Gressette*, 432 U.S. 491, 506-07 (1977).

Accordingly, it is by the court, this 12th day of January, 1983, hereby

ORDERED that Applicants' motion to intervene shall be, and hereby is, denied; and it is further

ORDERED, ADJUDGED, and DECREED that plaintiff's and defendant's joint motion to dismiss shall be, and hereby is, granted; and it is further

ORDERED that plaintiff's action shall be, and hereby is, dismissed.

/s/ Edward A. Tamm
United States Circuit Judge

/s/ Thomas A. Flannery
United States District Judge

/s/ Harold H. Greene
United States District Judge

APPENDIX B

Notice of Appeal

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-2673

STATE OF MISSISSIPPI,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant,

and

HENRY J. KIRKSEY, *et al.*,
Applicants for Intervention.

[Received Mar. 10, 1983]

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Henry J. Kirksey, et al., applicants for intervention herein, hereby appeal to the Supreme Court of the United States from the final order entered in this action on January 12, 1983, denying applicants' motion to intervene and dismissing this action.

This appeal is taken pursuant to 28 U.S.C. § 1253 our [and] 42 U.S.C. § 1973C.

Respectfully submitted,

/s/ Frank R. Parker
FRANK R. PARKER
WILLIAM L. ROBINSON
PATRICIA M. HANRAHAN
Lawyers' Committee for Civil Rights Under Law
733 15th St., N.W., Suite 520
Washington, D.C. 20005
(202) 628-6700

NAUSEAD STEWART
Lawyers' Committee for Civil Rights Under Law
210 So. Lamar St., Room 720
Jackson, MS 39201

Attorneys for Intervenors

CERTIFICATE OF SERVICE

This is to certify that I have this day mailed, postage prepaid, a copy of the attached Notice of Appeal to the Supreme Court of the United States to the following counsel for the parties.

Gerald W. Jones, Esq.
Paul F. Hancock, Esq.
Jeremy I. Schwartz, Esq.
John K. Tanner, Esq.
Voting Section, Civil
Rights Division
U.S. Department of Justice
Washington, D.C. 20530

Jerris Leonard, Esq.
Kathleen Heenan, Esq.
900 17th St., N.W., Su. 1020
Washington, D.C. 20006

R. Scott Levanway
727 N. President Street
P. O. Box 1429
Jackson, MS 39205

William A. Allain,
Attorney General
William S. Boyd,
Special Assistant
Attorney General
Office of the Attorney General
Gartin Building
420 High Street
Jackson, Mississippi 39201

Champ Terney, Esq.
Hubbard T. Saunders, IV, Esq.
Nicki Martinson, Esq.
1164 Deposit Guaranty Plaza
Jackson, MS 39201

This the 9th day of March, 1983.

/s/ Frank R. Parker
FRANK R. PARKER

APPENDIX C

Statutory Provision and Federal Rule Involved

Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, provides:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the

guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this action. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

Pub.L. 89-110, Title I, § 5, Aug. 6, 1965, 79 Stat. 439, redesignated and amended Pub.L. 91-285, §§ 2, 5, June 22, 1970, 84 Stat. 314, 315; Pub.L. 94-73,

Title II, §§ 204, 206, Title IV, § 405, Aug. 6, 1975, 89 Stat. 408, 405.

Rule 24, Federal Rules of Civil Procedure, provides:

Rule 24. Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the

grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C. § 2403.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966.)